BEFORE THE
POLLUTION CONTROL HEARINGS BOARD
STATE OF WASHINGTON

IN THE MATTER OF CUDAHY COMPANY, Appellant, v. PUGET SOUND AIR POLLUTION CONTROL AGENCY, Respondent.	PCHB Nos. 77-98, 77-102, 77-115 and 77-140 FINAL FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

This matter, the consolidated appeals from the issuance of four separate $250 civil penalties for alleged violations of Section 9.11(a) of respondent's Regulation I, came before the Pollution Control Hearings Board, Chris Smith and Dave J. Mooney at a formal hearing in Seattle on October 31, 1977. David Akana presided.

Appellant was represented by its attorney, Linda J. Cochran; respondent was represented by its attorney, Keith D. McGoffin.

Having heard the testimony, having examined the exhibits, and

having considered the hearing and post-hearing briefs of the parties, the Pollution Control Hearings Board makes these

FINDINGS OF FACT

I

Pursuant to RCW 43.21B.260, respondent has filed with the Board a certified copy of its Regulation I and amendments thereto which are noticed.

II

Cudahy Company (hereinafter "appellant"), a manufacturer of meat products is located in an industrial area of Seattle. Its present facilities were built in 1921 by the then owner, Frye Packing Company. Appellant acquired ownership of the business in 1956.

Immediately north of and across an alley from appellant's plant is the Mack Truck Company. Further to the north is located a moving company and the Oberto Sausage Company. East of appellant is the Pacific Diesel Brake, Inc. and Transport Grill, a restaurant.

III

Appellant slaughters and processes pork into products such as frankfurters, smoked hams and sausages. Live hogs are transported to appellant by railroad. Because appellant does not operate through the weekend but continues to receive hogs, on Mondays, or on Tuesdays after a three day weekend, there are found some (three to six) hogs, which have died in transit, in various stages of decay. Appellant puts the dead hogs, each weighing about 220 pounds, and other waste products from the slaughter process into four

7,000 pound capacity cookers for rendering. Up to 80,000 pounds of inedible material per week is rendered and such rendering is an income-producing operation.

IV

On May 31, 1977 at 8:55 a.m., in response to a complaint from an employee of Mack Truck, respondent's inspector visited the complainant's location where he smelled a very strong odor. The odor was traced and determined to come from appellant's facilities. The inspector described the odor as a "very pungent stinking odor--rancid meat" which almost caused him to "throw up". Appellant was contacted by the inspector who subsequently issued a notice of violation to appellant for the odor. Thereafter, appellant was issued a $250 civil penalty which is the subject of the first of these consolidated appeals.

V

On June 20, 1977 at 8:15 a.m., in response to a complaint, respondent's inspector again visited the Mack Truck location where he verified the presence of a "strong putrid" odor which tended to tighten his stomach, similar in smell and effect, but stronger than that noted on the May 31st occurrence. The odor was determined to come from appellant's facility. Appellant was issued a notice of violation by certified mail from which followed a $250 civil penalty and the second of these consolidated appeals.

VI

On July 25, 1977 at about 11:00 a.m., respondent's inspector arrived at complainant's location at Mack Truck but did not immediately

detect an odor. After walking about the location he did notice an odor which was not as strong as he had detected on his two previous visits. The employees at Mack Truck claimed that the odor from appellant's property had been stronger than that which the inspector noted. Appellant was sent a notice of violation by certified mail from which followed a $250 civil penalty and the third of the instant consolidated appeals.

VII

On August 29, 1977 at 9:00 a.m., respondent received an odor complaint from an employee at Mack Truck. Respondent dispatched another inspector who arrived at the complainant's site at 2:20 p.m. and verified the presence of a "strong, obnoxious" odor which made him want to leave the area and which he rated as ≠3 on a 0-4 scale. Before doing so, however, the inspector ascertained that the source of the odor came from appellant's facilities. Appellant was issued a notice of violation by certified mail from which came a $250 civil penalty and the last of these consolidated appeals.

VIII

Respondent used no mechanical tests in its determinations but relied solely upon the sense of smell of the complainants and its inspectors. When it received a complaint of odor and detrimental effects thereof, and if such complaint could be verified by the inspectors, a citation would be issued as was done here.

IX

Present on each day here relevent, an employee

of Mack Truck, Marvin Thurnaau, described the smell as a "harsh penetrating" kind of odor, and that "when really bad, it makes your stomach bad enough so you don't want to eat." Another employee, Mr. Koestner, testified that the odors on May 31, June 20 and August 29 were like "rotting meat," made his stomach turn, and eyes water. The shop foreman, Mr. Koenig, testified that the odor was stronger on the four days in question than was usual, and that the "strong pungent odor" was the sort of thing you do not want to take a large lungful," thus making breathing more difficult. Four other employees similarly testified to such odors on one or more occasions.[1] Appellant's plant supervisor concedes that in the summer, a dead hog "gets pretty rank" in 36 hours.

X

The odor neither caused physical illness nor caused any employee to miss work. However, the odor constituted an unreasonable annoyance or distraction to those employees subjected to it because it detrimentally affected some employees' concentration at work, and appetites.

XI

Perception of odors is, in part, psychological and can cause a different reaction from each person. Thus, knowledge of the nature of a source of an odor can affect one's perception of a smell.

Some odors can be enhanced by the effect of other odors. Diesel

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1. The evidence is replete with terms used by the affected employees to describe the odor with which we do not burden this decision.

odors surrounding some complainants were not shown to enhance odors from appellant's facilities in a significant manner.

XII

There are "objective" methods to measure the threshold limits of odor which are superior to one person merely smelling the air. One method is the ASTM panel method and another is the olefactor meter method. Both methods ultimately rely upon the nose, which is the only tool to detect odor and to measure its intensity.

XIII

Appellant has recently taken housekeeping and sanitation measures to reduce odor. Cookers are now cleaned and yards cleared of dead hogs more frequently; odor suppressants are used. Complainants have noticed a lessening of the odor over the last six months.

Appellant's general manager opines that most of the odor comes from rendering of dead hogs. Appellant's supervisor opines that older materials cause the odor.

XIV

Any Conclusion of Law which should be deemed a Finding of Fact is hereby adopted as such.

From these Findings the Board comes to these

CONCLUSIONS OF LAW

I

The Board has jurisdiction over the persons and over the subject matter of this proceeding.

II

We first go to appellant's constitutional issues. This Board

declines to rule upon them because "an administrative tribunal is without authority to determine the constitutionalty of a statute . . . ." Yakima Clean Air Authority v. Glascam Builders, Inc., 85 Wn.2d 255, 257 (1975). The Pollution Control Hearings Board is such an administrative tribunal. Id. at 264. RCW 43.21B.010, .020. We therefore presume that the statutes and rules considered are constitutional and proceed to the interpretation of them.

III

Section 9.11(a) of Regulation I provides that:

> It shall be unlawful for any person to cause or permit the emission of an air contaminant or water vapor, including an air contaminant whose emission is not otherwise prohibited by this Regulation, if the air contaminant or water vapor causes detriment to the health, safety or welfare of any person, or causes damage to property or business.
> . . . .

Compare WAC 173-400-040(5).

"Air contaminant" is "dust, fumes, mist, smoke, other particulate matter, vapor, gas, odorous substance, or any combination thereof." Section 1.07(b); RCW 70.94.030(1). "Emission" is the "release into the outdoor atmosphere of air contaminants." Section 1.07(j); RCW 70.94.030(8). Air Pollution is defined as:

> . . . presence in the outdoor atmosphere of one or more air contaminants in sufficient quantities and of such characteristics and duration as is, or is likely to be, injurious to human health, plant or animal life, or property, or which unreasonably interfere with enjoyment of life and property. Section 1.07(c). RCW 70.94.030(2).

Section 9.11(a) thus makes "air pollution" unlawful. Therefore, when an odor is present in the outdoor atmosphere in sufficient

quantities and of such characteristics and duration as is, or is likely to be, injurious to human health, plant or animal life, or property, or which unreasonably interferes with enjoyment of life and property, Section 9.11(a) is violated. This standard is not unlike the common law nuisance standard requiring substantial interference of a protected interest. PROSSER, LAW OF TORTS (1971), Sections 86-88; Comment, 46 Wash. Law Rev. 47 (1970). Similarly, the statutes regarding nuisances are not unlike the instant regulation:

> . . . whatever is injurious to health or indecent or offensive to the senses, or an obstruction to the free use of property, so as to essentially interfere with the comfortable enjoyment of the life and property, is a nuisance and the subject of an action for damages and other and further relief. RCW 7.48.010.
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> . . . Nuisance consists in unlawfully doing an act, or omitting to perform a duty, which act or omission either annoys, injures or endangers the comfort, repose, health or safety of others, offends decency, or unlawfully interferes with, obstructs or tends to obstruct, or render dangerous for passage, any lake or navigable river, bay, stream, canal or basin, or any public park, square, street or highway; or in any way renders other persons insecure in life, or in the use of property. RCW 7.48.120.
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> A public nuisance is a crime against the order and economy of the state . . .
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> . . .
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> Every act unlawfully done and every omission to perform a duty, which act or omission
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> (1) Shall annoy, injure or endanger the safety, health, comfort, or repose of any considerable number of persons; . . . Shall be a public nuisance. RCW 9.66.010

The Supreme Court in State v. Primeau, 70 Wn.2d 109 (1966) held the language of RCW 9.66.010 sufficient to inform a person of ordinary understanding that one commits a nuisance by doing an unlawful act so as to annoy, injure or endanger the comfort, repose, or health of a considerable number of persons, and thus not too vague or indefinite so as to be unconstitutional. State v. Reader's Digest Ass'n, 81 Wn.2d 259, 501 P.2d 290, appeal dismissed, 93 S.Ct. 1927, 411 U.S. 945, 36 L.Ed.2d 406; Sonitrol Northwest v. Seattle, 84 Wn.2d 588 (1974). In Primeau, the statutory scheme was described as being "largely declaratory of the common law" of public nuisance. 70 Wn.2d at 112. We conclude that the language of Section 9.11(a) as applied to this civil matter similarly informs a person of ordinary understanding of what is proscribed. In interpreting Section 9.11(a), the fundamental inquiry is not whether the use to which property is put is reasonable or unreasonable, but whether air pollution is of such characteristics and duration as is, or is likely to be, injurious to human health, plant or animal life, or property, or which unreasonably interferes with enjoyment of life and property. See Crow Roofing and Sheet Metal, Inc. v. Puget Sound Air Pollution Control Agency, PCHB No. 1098; Boulevard Excavating, Inc. v. Puget Sound Air Pollution Control Agency, PCHB No. 77-69.[2] It matters not

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2. Appellant's reliance on cases based on an Illinois statute (Ill.Rev.Stat. 1971 ch. 111-1/2, par. 1033(c)(i-iv)) which set forth specific inquiries to be considered are not similarly required by chapter 70.94 RCW or Regulation I.

The absence of any further specific standards in Regulation I is not ultra vires RCW 70.94.380 nor does such violate due process. Moreover, there are procedural safeguards to guard against arbitrary action. Yakima Clean Air v. Glascam Builders, 85 Wn.2d 255 (1975) and concurring opinion at 264.

for purposes of finding a violation, under Section 9.11(a), that a polluter has taken all reasonable and technically feasible precautions to prevent an unlawful odor. The violation is complete once an unlawful odor is found. It does matter, for purposes of mitigation of a civil penalty, that such precautions were taken.[3] In the instant cases, respondent did not prove injury to human health, plant or animal life, or property. In determining whether the air pollution unreasonably interferes with enjoyment of life and property, the remaining issue, we note that the precise degree of discomfort and annoyance experienced cannot be definitely stated. Suffice it to say that complainants

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3. Compare Section 9.15(c) with the instant regulations:

> . . .
> (c) It shall be unlawful for any person to cause or permit untreated open areas located within a private lot or roadway to be maintained without taking reasonable precautions to prevent particulate matter from becoming airborne.

Section 9.15(c) states, in essence, that it is unlawful to cause particulate matter to become airborne without taking "reasonable precaution" to prevent such. Respondent's rule thus provides that if such reasonable precautions are taken, then there is no violation. Weyerhaeuser Company v. PSAPCA, PCHB No. 1076. Respondent's Section 9.11(a) makes no similar allowance. Although appellant urges us to consider reasonableness from the viewpoint of the polluter, we must decline to amend Section 9.11(a) by order. Those factors urged by appellant would be more appropriately considered, insofar as a violation of the regulation is concerned, in a variance proceeding. We believe the overall regulatory scheme as interpreted in this matter is consistent with the policy of the Clean Air Act as stated in Section 1.01 and RCW 70.94.011.

should be persons of ordinary and normal sensibilities.[4] Respondent must prove its case by a preponderance of the evidence. In weighing such evidence, we conclude that odor from appellant's facilities on May 31, 1977, June 20, 1977 and August 29, 1977 was an unreasonable and substantial discomfort and annoyance to persons of ordinary and normal sensibilities.[5] We further conclude that it is practicable and economical for appellant to reduce its odor. Since the odor is caused by "older materials," including dead hogs, which accumulate over a weekend, it is apparent that proper disposal or operating procedures can minimize the odor without undue economic burden. Assuming that it were not reasonably and technically feasible to control the odor, which we do not here conclude on this record, appellant's remedy is to apply for a variance under Article 7 of

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4. "Where the invasion affects the physical condition of the plaintiff's land, the substantial character of the interference is seldom in doubt. But where it involves mere personal discomfort or annoyance, some other standard must obviously be adopted than the personal tastes, susceptibilities and idiosyncracies of the particular plaintiff. The standard must necessarily be that of definite offensiveness, inconvenience or annoyance to the normal person in the community--the nuisance must affect 'the ordinary comfort of human existence as understood by the American people in their present state of enlightenment.'" Prosser, supra at 758 (citations omitted).

5. Appellant's reliance on Queen City Sheet Metal and Roofing, Inc. v. PSAPCA, PCHB No. 534 which related the testing procedures then used by respondent, i.e., to have two inspectors investigate an odor complaint, is not well placed. Neither Section 9.11(a) nor Regulation I requires, so far as we are aware, two inspectors to be present when investigating an odor.

Regulation I, and if it qualifies thereunder, we are confident that one would be granted. We conclude that respondent did not show, by a preponderance of the evidence, that appellant caused an odor of such discomfort and annoyance which violated Section 9.11(a) on July 25, 1977. We are not persuaded, upon the generalized statements of complainants, that an unlawful odor occurred on July 25.

IV

Respondent's methods to detect odor and its severity, i.e., the noses of its inspectors and witnesses, are not invalidated by the existence of other so called "objective" methods, which also rely on the nose.[6]

V

Appellant's contention that Section 9.11(a) is not an emission control requirement is without merit. The section "controls," by making unlawful, the "emissions" of air contaminants into the outdoor atmosphere which have detrimental effects as above discussed. The

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6. Neither Bortz Coal Co. v. Air Pollution Commission, 2 Pa. Cmwlth 441, 279 A.2d 388 (1971) (agency did not use established methods for determining violations, but relied on opinion evidence) nor Draper and Kramer Inc. v. Illinois Pollution Control Board, 40 Ill. App.3d 918, 353 N.E.2d 106 (1976) (agency failed to establish that company caused injury) cited by appellant applies. Here, there is no evidence of a recognized "objective" odor test to measure whether a violation of section 9.11(a) has occurred. In fact appellant's expert testified that we are just now "coming along" with the technology which would enable quantification of odor. Assuming such technology was available, we must yet determine whether an odor unreasonably interferes with enjoyment of life and property. In the meantime, we are left with our standard, imprecise as it is. Historically such lack of quantified standards have not prevented action relating to air pollution. See e.g. Bortz Coal Co., supra, 279 A.2d at 391; Comment, 46 Wash. Law Rev. 47 (1970).

fact that the limitations cannot be conveniently quantified is not fatal to its enforcement. Moreover, respondent has been delegated rulemaking authority within a certain statutory framework and enforcement powers. RCW 70.94.141; .151; .331; .380. See Section 1.01 of Regulation I. Section 9.11(a) of Regulation I appears reasonably consistent with the statute and the state regulations promulgated thereto (chapter 173-400 RCW) and should be presumed valid. Weyerhaeuser v. Department of Ecology, 86 Wn.2d 310, 314 (1976). Such rule should not be invalidated merely because this Board might believe it "unwise." Id.

VI

Appellant contends that Section 9.12(a) which provides that:

> Effective control apparatus and measures shall be installed and operated to reduce odor-bearing gases or particulate matter emitted into the atmosphere to a reasonable minimum

should be charged rather than Section 9.11(a) "because 9.12 is the emission standard relating to odors while Section 9.11(a) related to other air contaminants not regulated by the more specific standards." The very language of Section 9.11(a) rebuts appellant's contention regarding its applicability to odor. If respondent charged appellant with the wrong section, it would not be able to prove its case. Certainly it is respondent which must live with its choices. It is not for appellant to claim as a defense to the violation of one section of a regulation that it should have been charged under a different section of that regulation. See Sittner v. Seattle, 62 Wn.2d 834, 836 (1963).

VII

Appellant violated Section 9.11(a) on May 31, 1977, June 20, 1977 and August 29, 1977 and each $250 civil penalty assessed pursuant to Section 3.29 of Regulation I is reasonable in amount, under the circumstances, and should be affirmed.

Appellant was not shown to have violated Section 9.11(a) on July 25, 1977 and the $250 civil penalty therefor should be vacated.

VIII

Respondent did not notify, and is not required to notify, appellant that its inspectors would be investigating a complaint prior to the inspection.

IX

Any Finding of Fact which should be deemed a Conclusion of Law is hereby adopted as such.

From these Conclusions, the Pollution Control Hearings Board enters this

ORDER

1. Each $250 civil penalty in PCHB Nos. 77-98, 77-102 and 77-140 is affirmed.

2. The $250 civil penalty in PCHB No. 77-115 is vacated.

DATED this 15th day of December, 1977.

POLLUTION CONTROL HEARINGS BOARD

CHRIS SMITH, Member

DAVE J. MOONEY, Member